Although under the title theory some courts, by denying the mortgagee's right to possession until default by the mortgagor,[7] illogically say in effect that a deed which purports to pass title at once does not do so until default, yet the general law is, that by reason of his legal title such a mortgagee acquires the right to immediate possession.[8] On the other hand, by the lien theory a mortgagee has no enforceable right to possession. When, however, he has once obtained lawful possession he cannot be ousted except by redemption.[9] Under both theories the mortgagee in possession must account for rents and profits.[10]

Where the mortgagee has the legal title the mortgagor's right to an account is purely equitable. It is an incident to the equity of redemption,[11] and consequently no longer exists when the mortgage has been extinguished.[12] Unquestionably the receipt of rents and profits does not, in either form of mortgage, amount to a legal satisfaction of the debt. Accordingly, there can be no garnishment of a mortgagor's right to an account;[13] and the mortgagor, in an action of ejectment, cannot show satisfaction of the debt by the mortgagee's receipt of rents and profits.[14] Even under a statute providing for the revesting of title upon payment of the mortgage debt, the receipt of rents and profits to this amount is not deemed a payment.[15] It is said that the mortgagee in possession takes the rents and profits in the character of a *quasi*-trustee or bailiff for the mortgagor;[16] and their receipt is treated as in the nature of an equitable set-off to the amount due on the mortgage debt.[17] A mortgagee in rightful possession is always entitled to reimbursement for improvements, taxes, repairs, etc.; and until an accounting has been taken in a court of equity the debt is unsatisfied and the position of the parties unchanged.[18] But where in a suit for foreclosure the mortgagor asks for an accounting, he is clearly entitled to have the amount received in rents and profits set off against the mortgage debt. *Hoye* v. *Bridgewater*, 118 N. Y. Supp. 951 (Sup. Ct., App. Div.).

LEGAL EFFECT OF AN INSTRUMENT AS AFFECTED BY THE PAROL EVIDENCE RULE. — It is a general rule that when any judgment, disposition of property, agreement, or other undertaking has been reduced to writing, and is evidenced by a document or a series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.[1] This rule is founded on the presumption that all terms and conditions have been integrated in the document. It is

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[7] Barnett *v.* Timberlake, 57 Mo. 499.
[8] Gilman *v.* Wills, 66 Me. 273.
[9] Becker *v.* McCrea, 94 N. Y. Supp. 20.
[10] See Hubbell *v.* Moulson, 53 N. Y. 225; Dawson *v.* Drake, 30 N. J. Eq. 601.
[11] Seaver *v.* Durant, 39 Vt. 103.
[12] Wilcox *v.* Cheviott, 92 Me. 239.
[13] Toomer *v.* Randolph, 60 Ala. 356.
[14] Green *v.* Thornton, 96 Pac. 382 (Cal.).
[15] Farris & McCurdy *v.* Houston, 78 Ala. 250.
[16] See Hubbell *v.* Moulson, *supra*.
[17] See Green *v.* Thornton, *supra*.
[18] See Hubbell *v.* Moulson, *supra*.

[1] Angell *v.* Duke, 32 L. T. R. N. S. 320.

really a statement in terms of evidence of the rule of the substantive law, that when a legal act is reduced into a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.[2] The substantive law makes certain exceptions, however. For example, oral evidence is admitted to rebut an equitable presumption, and thus support the instrument as it appears on its face. So, parol evidence is admissible to rebut the equitable presumption that a conveyance of land for which the consideration is furnished by a third person gives rise to a resulting trust in favor of such third person;[3] or that a conveyance to a child, for which the consideration is furnished by the parent, is as a gift or advancement;[4] or that a conveyance paid for by the husband and taken in the name of his wife is a provision for her.[5]

A second exception to the rule of substantive law is, that when a contract is proved to be incomplete, by circumstances showing that the parties must have intended something else, evidence of another agreement is admissible.[6] The question in such cases is whether there is a vacuum to be filled; that is, whether there appears to be no express mention of an important detail, which the law will not supply. If, however, the defect is such as will be supplied by legal presumption, the want of express provision leaves no vacuum; the legal meaning of a written instrument, though not apparent from the terms of the instrument itself, can no more be explained, contradicted, or controlled by parol or extrinsic evidence, than if such meaning had been expressed. Thus if there is in a written contract no specification as to time of performance, the legal presumption is that performance must be within a reasonable time[7] and that payment is not to be until the other party has performed;[8] if no time for payment, that payment must be on demand;[9] if no price, that a reasonable price must be paid.[10] In none of these cases is parol evidence admissible, since the law has permitted no vacuum.[11] Similarly, parol evidence cannot be introduced for the purpose of changing the effect attached by the law to certain transactions, such as the assignment of a mortgage note, which, in the eye of the law, is an assignment of the security also;[12] or the indorsement in blank of a bill or note, which makes the indorser a guarantor;[13]

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[2] Pitcairn *v.* Philip Hess Co., 125 Fed. 110. See THAYER, PRELIM. TREATISE EVIDENCE, p. 397.

[3] Livermore *v.* Aldrich, 5 Cush. (Mass.) 431.

[4] Taylor *v.* Taylor, 9 Ill. 303.

[5] Wallace *v.* Bowen, 28 Vt. 638.

[6] Gould *v.* Boston Excelsior Co., 91 Me. 214. See Wheaton, etc. Co. *v.* Coye Mfg. Co., 66 Minn. 156.

[7] Atwood *v.* Cobb, 16 Pick. 227.

[8] Thompson *v.* Phelan, 22 N. H. 339.

[9] Thompson *v.* Ketcham, 8 Johns. (N. Y.) 190.

[10] Williams *v.* Kansas City, etc. Ry. Co., 85 Mo. Ap. 103.

[11] Other instances are contracts for personal service which, if silent as to duration, either party may terminate at pleasure. Irish *v.* Dean, 39 Wis. 562. And engagements to perform an act, where evidence that the other party orally agreed to supply certain means is inadmissible because the engagement from its nature involved undertaking to secure the means necessary to the accomplishment of the object. Godkin *v.* Monahan, 83 Fed. 116.

[12] Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

[13] Martin *v.* Cole, 104 U. S. 30. *Contra*, Dickenson *v.* Burke, 8 N. D. 118.

or the absolute grant of land so situated that egress necessitates a way over the grantor's land.[14]

By a novel extension of these principles, a recent case decided that where an offer had been made in writing and an acceptance, also in writing, had been made more than a reasonable time thereafter, parol evidence of an agreement by the offeror to continue the offer was not admissible. *Standard Box Co.* v. *Mutual Biscuit Co.*, 103 Pac. 938 (Cal.). The soundness of the extension may be doubted, for the contract of the parties may well have been concluded by the written acceptance of the parol offer, the latter incorporating the terms of the earlier written offer.

RECENT CASES.

ACCOUNT — DUTY TO ACCOUNT — REQUISITE FIDUCIARY RELATION NOT ESTABLISHED BY CONTRACT. — In consideration of a royalty equivalent to 25 per cent of the net profits of the business as continued by the defendants, the plaintiff sold his business to them together with an exclusive license for the use of his trademarks for a limited period. The defendants thereafter created the B. company to exploit a cheaper grade of perfumery, not bearing the plaintiff's trademarks. The plaintiff sought an accounting of the B. company's business. *Held*, that the plaintiff has no remedy in equity. *Thompson* v. *Crown Perfumery Company & Batcheller Importing Company*, 42 N. Y. L. J. 845 (N. Y. App. D., Nov., 1909).

The plaintiff contended that the relation of the parties was that of *quasi*-partners, in which case the right to an accounting exists. *Marston* v. *Gould*, 69 N. Y. 220. And he alleged that such fiduciary relationship precluded the defendants from conducting any rival business, so that they were liable to account for the same. *Somerville* v. *Mackay*, 16 Ves. 382. It is clear that where there is a fiduciary relationship, equity will compel an accounting. *Harvey* v. *Sellers*, 115 Fed. 757. Otherwise, equity will not interfere. *Foley* v. *Hill*, 2 H. L. Cas. 28. The authorities, however, do not support the plaintiff's contention that a fiduciary relationship existed. If the defendants had agreed to pay over 25 per cent of the net profits as such, they would have become liable as *quasi*-trustees of a specific fund. *Pratt* v. *Tuttle*, 136 Mass. 233. On the other hand, an obligation to pay by way of royalty gives no ground for an account. *Moxon* v. *Bright*, L. R. 4 Ch. 292. And where the profits are merely designated as a measure by which to determine compensation, there is no fiduciary relation. See *Bradley* v. *Wolff*, 40 N. Y. Misc. 592. The plaintiff got no legal interest in the profits. His action was merely one upon a contract to recover royalties, and should have been brought at law. *Preston* v. *Smith*, 156 Ill. 359. The fact that a statement of an account between him and the defendants was necessary to establish his claim, did not require equitable action. *Smith* v. *Bodine*, 74 N. Y. 30.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — INJURIOUS FALSEHOOD BY AGENT. — The plaintiff's declaration alleged that salesmen of the defendant "while acting in the scope of their authority as such salesmen" made false statements about the plaintiff, intending to cause and actually causing damage to the plaintiff's business. *Held*, that the declaration states no cause

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[14] Isett *v.* Lucas, 17 Iowa 503; Lebus *v.* Boston, 107 Ky. 98, takes an opposite view, but can be explained on the ground that really the oral agreement to release an existing way proved that the situation did not call for the imposition of a way of necessity.